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ABSTRACT

The recent growth of school-related laws and regulations has magnified the court role in setting education policies through legal decision. State courts have traditionally played a primary role in disposing of education disputes, but their role has diminished while the federal court role has increased. This is due to a lag between state and federal law both in the development of substantive law and in the evolution of litigation procedures. The author suggests avenues of exploration to improve the role of state courts. He identifies institutional deterrents to the use of state courts vis a vis federal courts; restrictive trial procedures and principles that state courts control and should review; the gap between state and federal court remedies; and areas of substantive lawmaking wherein some states have exerted authority to solve education issues in ways not achievable in federal courts. As a working study paper, this publication focuses, not on specific solutions, but on lines of inquiry and research that may contribute toward such solutions and the enhancement of state court involvement in the judicial disposition of school-related issues that have large policy implications for education and society. (Author/JK)

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THE ROLE AND INFLUENCE OF STATE COURTS ON EDUCATIONAL POLICY AND PRACTICE

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April 1980

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Abstract

The unprecedented growth of school-related laws and regulations in recent decades have magnified the role of courts in setting education policies through legal decision. State courts have traditionally played a primary role in disposing of education disputes, but their role has diminished while the federal court role has increased. This is due to a perceptible lag between state and federal law both in the development of substantive law and in the evolution of expeditious litigation procedures.

The author suggests avenues of exploration to improve the role of state courts. He identifies institutional deterrents to the use of state courts vis a vis federal courts; restrictive trial procedures and principles which state courts control and should continually review; the gap between the state court remedies and those afforded by the federal courts; and areas of substantive lawmaking wherein some states have exerted authority to solve education issues in ways not achievable in federal courts.

As a working study paper, this publication focuses, not upon specific solutions, (some of which require legislative and political as well as judicial reforms), but upon lines of inquiry and research which may contribute toward such solutions and the enhancement of state court involvement in the judicial disposition of school-related issues that have large policy implications for education and society.

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I. PRELIMINARY OBSERVATIONS

The influence of state courts on educational decisions is ancillary in theory but decisive in practice. While the courts' avowed function is of a reactive nature (the application of standards fixed by the legislative and executive departments, or testing the legality of those standards against higher constitutional law), their rulings represent the final stage of implementing contested decisions. The judicial "last say" regarding the meaning and legal application of a particular law or policy is most frequently an enduring one. No other department can reverse state court rulings that are grounded in constitutional law, and rarely do legislatures enact statutes specifically in response to nonconstitutional court decisions. Legislatures seldom react to judicial pronouncements unless there is strong pressure from special interest groups, because there is little legislative monitoring of the gradual buildup of judge-made policy that occurs over a series of related cases. The interstitial process of lawmaking by case trends is far less apparent and seemingly less significant than the regulatory actions of legislative and administrative bodies.

In recent years, however, the dynamics of court superintendence of public school activity has become

quite evident. The spread of court injunctions under the desegregation and civil rights movements signaled the affirmative power of courts to revise public education much more rapidly than was possible through political action or administrative appeals. Grievants quickly learned the special advantages of being able to pick and choose the most favorable fact setting in which to raise a test case, and to be able to select a sympathetic judicial forum of their own preference, at least in the federal court system.

The fervor, some might say fever, to win a "quick fix" by a promising suit soon spread to most vested interest groups in our schools. The growing propensity for litigation was further augmented by federal legislation that authorized successful plaintiffs to sue for and recover money damages for themselves, 1/ and attorneys' fees for their counsel. 2/ Even these developments, however, do not exhaust all reasons for studying the prospective roles of state courts in shaping the governance of state schools. The fact that the courts' role is incremental and somewhat hidden in its cumulative impact further necessitates an understanding of how they develop or should develop educational guidelines in the future. This paper is but one of a series of background essays on possible lines of research for

enhancing the role of state government organs in evolving governing policies for our schools. As a working paper looking to the development of promising lines of research, it offers no definitive critique on the wisdom of the suggested means by which state courts may assure their proper involvement in and approach to education disputes. This paper is not a plea for either more or for less judicial activism and creativity, but merely explores state court rules and processes which influence their usefulness as an official body with a view to identifying areas that merit further research. Questions concerning the staffing or institutional design of state court systems are not addressed.

The renewed interest in the efficacy of state institutions stems in part from concerns that they have not kept pace with changing social needs or the modified and diverse missions of the schools. Lagging state influence is also imputed to the federal government's moving too far and too fast with the result of federalizing many school policies and practices. The charge persists that federal institutions have excessively displaced the roles of the states in education and have discouraged local school authorities who are now inclined to "lay back" on difficult issues in anticipation that Congress, the federal courts, or the federal bureaucracy will, in any case, ultimately devise and impose their own solutions.

The concern over federal centralization is not totally groundless. However honestly federal authorities disclaim intent to interfere with public education authorities or to nationalize standards for myriad school districts, 3/ the fact remains that each declaration of federal "rights" affecting teachers, students, and specified minority groups, and each federal program of financial assistance, carries with it federal mandates and remedies which delimit the operative discretion of school administrators. They also tend to redirect spending priorities of non-federal funds.

However much federal agencies profess to delegate to local school districts the authority to carry out federal requirements, those delegations also cut a trail for federal surveillance and sanctions to assure compliance with federal law, and to overcome any local resentment and resistance. Finally, the layering of multiple federal programs upon the schools, with each one separately shaped to specific problems [independently of their cumulative effects on every other school program] exerts a tail-end directive influence upon the entire school enterprise. Thus state courts have become less attractive forums than the federal courts both with respect to substantive law areas (e.g., where new federal statutes create new rights not conferred by state law); and with respect to judicial remedies and process (e.g.,

where federal relief is much swifter and more rewarding to grievants, than that provided by state courts).

Whether or not these concerns are exaggerated, it is clear that the changes in our schools require corresponding adaptation by the state institutions which supervise them. The trial and error stage of integrating new laws and policies affecting public schools must give way to more deliberate review of the institutional means by which such integrations are to be achieved.

Approaches to institutional reform range from total structural and political overhaul to incremental tinkering with particular departmental projects. It is well, therefore, to consider preliminarily what courses are to be preferred, and to discard those with little pragmatic potential. Comprehensive simplification of educational administration—by drastic reorganization of the political apparatus—doesn't hold much promise. Only a counter-revolution could undo the education revolution of the past 30 years. We are not about to abandon equal opportunity goals and a federal subsidy system that underlie the "legalization" of education. Newly minted federal law cannot, in any event, be revised by the states. If state institutions are to recapture <u>exclusive</u> jurisdiction over the schools, the Supremacy Clause of the federal Constitution 4/ would have to be repealed, an alternative which is neither feasible nor desirable. It would be equally

impractical to construct theoretical models of decision-making which are politically unrealistic.

Under the prevailing legal scheme we must be content with modest goals. I will, therefore, leave to others more ambitious, long-range, theoretical speculations about ideal structures that do not now exist.

Given the limitations of the prevailing system, the suggestion (made elsewhere 5/) that attention be centered upon the processes of decision by official agencies rather than upon their structure or politics is well taken. I will further narrow the focus to exclude the specialized problems regarding selection of the individuals entrusted with decisional responsibility. Merit selection of judges can be studied independently, though it relates directly to the performance of the courts.

The decisions affecting school policy and practice emanate from a diverse range of federal and state agencies, but process studies must begin with particularized investigation of the peculiar aspects of each source of decision. While compartmentalized study of separate decisional agencies is unavoidable at the start, they cannot remain isolated from each other. The interaction of decisional process between different parts of the government system must also be evaluated, right down to their final cumulative "bite" and impact on school activity. This vertical course of decision—from legislation to

regulation to official application and test suits—must be apprehended if we are to achieve any consistency in educational policy.

Equally important, and equally formidable, is the calculation of how decisions regarding isolated school programs generate "spillover" effects upon other school needs. The "externalities" of particular decisions bear directly upon their cost-benefit appraisal.

Devising mechanisms to trace how a series of separate decisions works out cumulatively is indeed an awesome task, but one that is essential. Reliable "feedback" from the schools on actual rather than paper outcomes will provide the final verdict regarding any or all stages of decisionmaking. I do not pretend to know how these tasks may be fully accomplished. I mention them here only to place necessary qualifications on the suggestions hereafter made with regard only to state courts.

A further preliminary word might be added on the fitness of courts, both federal and state, to make education policy. Courts are admittedly not equipped by training, experience or resources to establish or initiate policies for the schools, and they pass upon school standards only as a last resort. The fact remains, however, that our government system obliges courts to decide all properly presented legal disputes, including

those that implicate education. My purpose here is not to argue the merits of judicial oversight or guidance of education, but to resolve the question that is put, namely: how can state courts fulfill their roles more effectively when parties entitled to judicial ruling present their claims to the courts. That question implicates improved substantive lawmaking, as well as improved trial practices, and is complicated by the fact that the legal traditions of the respective states are not parallel, but are outgrowths of different regional histories and cultures. Whether and to what extent those differences produce different judicial attitudes toward educational issues would have to be explored in any study that speaks to all of the state court systems, rather than to a particular region of the country.

It should also be noted that the scope of state courts' "jurisdiction" to control trends on appeals in specific case categories is not always controlled by the courts themselves. Thus state legislatures as well as courts may promulgate rules or practices that either remove or defer court action, or provide other disincentives to parties who might otherwise seek relief in state courts. Both legislative and judicially created barriers to court actions are part of the problem concerning the roles of the courts. While legislative roles are beyond the scope

of this paper, they remain an important part of the problems that are later discussed.

An array of political forces that operates in and out of government partly explains legislative and executive foot dragging when dealing with the judiciary. Some of the political factors that must be addressed include:

> 1. Political resistance to replacing existing judicial appointment systems (tied to political affiliation) with non-partisan, independent selection panels;
>
> 2. Low and slow state legislative activity to enact new causes of actions and remedies, especially when state courts decline to change the law on the ground that the legislature has that responsibility;
>
> 3. State legislative refusal to investigate and speak to judicial performance and production standards;
>
> 4. The influence of past political association and common government service by and between sitting judges and state officials in the executive and legislative branches, viz. with respect to the hesitancy of judges to question or overturn executive or legislative actions; and the hesitancy of state courts to fashion stronger redress against government agencies.

There are different plausible interpretations of the political factors in state lawmaking; and one cannot generalize any universals that cover the unique political history of each state. Nevertheless, a profile of comparative data covering bellwether states in different regions may provide some substance to surface impressions that state court practices and doctrines on education have

lagged because the legislatures and the administrators are content to "leave well enough alone." The makeup by profession and political background of state legislatures and state judges can be readily ascertained. There is at least some truth to the fact that many legislator-lawyers contemplate appointment to the state court as either a primary personal goal, or an ultimate safe harbor from political misfortune. Such a person would naturally be inclined to favor an appointive system controlled by political allies. A judicial prospect would not be inclined to impose legislative restrictions upon judges which might later turn out to be inconvenient. Once on the bench, former state or political officials could be expected to recognize the "practical" perspective of their non-judicial colleagues. Individual judges have different capacities to develop new and independent perspective on old issues. While only a small number of the state political establishment reaches the bench, the fact remains that, for every state judge appointed, there are literally dozens of aspirants to the same post who are working in the same government or political party. There is no objective means to prevent background political experience from coloring judicial judgments, but the limits to which state judges should be susceptible to political influence is a question that cannot be ignored.

If, for example, Supreme Court Justices manifest different attitudes of deference to legislative activity, based upon their familiarity with the presented subject matter, how can lesser lights in the state courts escape their background attitudes as state legislators? To provide one example, Mr. Justice Lewis Powell, of the United States Supreme Court, is markedly more conservative and deferential to state officials in cases dealing with education where he has had long personal and professional experience on the management side, in contrast to his far less deferential attitudes and decisions on state laws not dealing with education. Intellectual balance can only rise from a keen awareness of political influences in one's own personal experience. Without that sensitivity, no effort at self-discipline can be very successful, and without some empirical demonstration of the connection (and confusion) between political and judicial judgment, that sensitivity may not emerge.

Before proceeding further, we might also stress some other facts on the nature of the judiciary. First, most judges are generalists who have little acquaintance with the more subtle aspects of education or with the complexities of school management. They need to be furnished full and accurate information. They are, therefore, dependent upon the competence (or incompetence) of legal counsel who present the cases. There is no neat process

solution to assure adequate work by lawyers, since lawyers as well as judges need the aid of educational specialists to help them develop adequate trial records. Second, relevant data must be presented in the forms that will be admitted as competent evidence under legal standards. As later noted, evidence rules do not always foster the search for essential data. Third, the law prohibits a judge, even if he or she knew how and where to find missing essential data, from going "outside the record," except in very limited instances. Findings must be limited to the record facts, even if they are incomplete, distorting, and objectively unsatisfactory. 6/ Fourth, whenever rapid social change moves too far ahead of existing legal concepts, the failure to evolve legal doctrines to address new conditions and issues leaves the law in a state of arrested development that is not suited to informed decision. Thus, in addition to competitive comparisons between federal and state legal systems, and the influence of non-judicial agencies upon judicial functions, we face process problems that are built into the judicial system itself.

The preceding and later comparisons of federal and state court roles look primarily to areas in which the federal court roles have displaced the former predominance of state courts, but this displacement is not

absolute. We still have important sources of state law which invest state courts with more effective authority than the federal courts in certain areas of education. Some illustrations of the superior advantages and potential of those areas of substantive state law, as administered by the state courts, are indicated later, particularly in part IV of this statement.

II. INSTITUTIONAL DETERRENTS TO USE OF STATE COURTS.

If a litigant has a choice of pursuing a claim in alternative forums, he or she will be advised by counsel to select that forum which:

1. Offers the quickest and best access to parties plaintiff for the type of claim that is involved;

2. Provides the most efficient and prompt form of hearing or trial, including the best means of establishing the record of facts upon which to make final judgments; and

3. Offers the most attractive legal relief.

These factors involve more than economies of time and cost for individual litigants. They directly determine the sources of substantive law that set social policy.

As long as a plaintiff can assert a federal law claim, there is little that others can do to redirect that case away from federal courts and into the state courts. Without elaborating the legal principles that govern federal and state court jurisdiction, it is generally true that

the current law does not force or favor submission of school-related grievances to state courts vis-a-vis the federal courts. The United States Supreme Court has established party standing-to-sue in federal courts whenever a plaintiff alleges that he or she is suing to vindicate a federal right, even though the federal claim is highly questionable, or is secondary to substantial state law claims. 7/ Expansive interpretations or implications of federal causes of action by federal judges 8/ in school-related claims that were previously submitted to state courts cannot be controlled by state officials, given the supremacy of federal law that is established by our Constitution. 9/ The federal courts have discretion to abstain, or to refer cases to state courts for decision under state law, but they have not shown a pronounced inclination to do so. This "competitive edge" of federal court power is one that state authorities are powerless to change. They can only try to make it less attractive.

Broadening Access to State Courts. Contrary to the modern trend in federal courts, state courts incline to adhere more strictly to the tradition of refusing to hear cases unless they are "justiciable." Under justiciability doctrines courts may refuse to hear cases that are not true controversies, or that are brought by parties unsuited to litigate the presentd issues. Justiciability

is tested by a number of rules which, in application, actually depend upon the discretion of individual judges. For example, courts can dismiss suits which they consider "moot," or conversely, not "ripe" for decision. The broad leeway courts have for hearing or excluding a case on these grounds arises from the lack of any accurate delineation of the point at which particular contests become sufficiently firm to warrant judicial resolution.

Further, judges can refuse to entertain even those cases that sharply present current issues, on the ground that the parties raising those issues are not sufficiently affected or are not best qualified to litigate the matter.

The thesis that state courts encourage resort to federal courts, and consequent federalizing of public school law, by unduly restrictive application of the above rules on access to state courts should be tested by reliable studies. Carefully structured research to collect available data and to compare the treatment of education-related suits by the courts in various states would at least alert state legislatures and state courts to the practical implication of their versions of justiciability. If it were demonstrated that the very condition state officials deplore, namely increased federal court intervention, is promoted by state court justiciability barriers, that may stimulate some fresh thinking by state

judges on their rules barring accessibility. Certain lines of procedural reform come to mind.

Standing to Sue. The standing decisions in different states reveal some striking comparisons. For example, Alan Bakke was accorded standing to sue in the California state courts on his claim of reverse racial discrimination, whereas Philip DiLeo, seeking to raise a similar claim in the courts of Colorado, had his case dismissed for lack of standing. 10/ The grounds of the Colorado state court decision seemed to verge on sheer technicality. 11/

Intervention. Judicial rules also control ability to join in suits already begun, by additional interested parties who seek to intervene and be heard in those actions. As with standing, the criteria to measure qualification to intervene are not rigid, but discretionary. Thus, any exploration of the uses of judicial discretion on party standing should include state court rulings on party intervention.

Class Actions. The broadest access courts can provide in public interest litigation is the class action in which all members of a commonly affected class are bound by the outcome, and in which their interests are affected by the trial performance of lawyers for the named class representative. The comprehensive scope of the class action, especially with respect to discrimination,

grievances, has been utilized by myriad special interest groups, under broad applications of both constitutional and statutory law. Its appeal is evident in the rash of class actions that involve the public schools.

Vis-a-vis the federal rules and experience with class actions, the state courts have been truly in a backwater; they have, with few exceptions, 12/ made little use of the class action. No model class action statute for state courts was even put forward until 1976, when the National Conference of Commissioners on Uniform State Laws adopted the current model law. While it is too early to predict how the states will respond to the new model act, 13/ it would be interesting to ascertain how well this law is suited to school litigation. It is drawn to cover a wide variety of lawsuits, but a special study of class actions with respect to education may indicate the need to develop special class action rules that are tailored to public education matters.

Declaratory Judgments. The declaratory judgment action expedites court relief, and is authorized by federal and state statutes. This form of action allows individuals in appropriate circumstances to obtain advance judicial ruling as to the meaning and operation of particular laws without requiring a party to risk liability or prosecution in order to test the statutes; and without engaging in a multiplicity of individual suits to clarify different features of the same statute. 14/

Whether declaratory judgment relief is available under a statute may also depend on the loose or strict interpretation which a court adopts in defining its scope. It is not clear why the declaratory judgment action has not been more used in state court actions, i.e. whether the statutes are too restrictive, or whether state courts elect to interpret those statutes restrictively. Whatever the reasons, a comparative survey of the scope and utility of this form of action in the different states, focused on public education litigation, would help to ascertain whether and how this form of law clarification might be better used in state courts.

In mentioning the foregoing possibilities, I do not suggest that liberalizing access to state courts is without costs. Countervailing policies against excessive indulgence of public actions by the courts may be argued. While these factors cannot be pursued in detail here, any study to improve the roles of state courts would have to weigh the institutional strains that state courts would encounter by greater allowance of class actions.

Intensive research that focuses on the process dynamics of school-related litigation is sparse, and law reviews and professional journals have not taken up the slack. I believe such studies are scant because the burden of

compiling, comparing and analyzing the separate law and practices of each state court system is too heavy in time, cost and available resources, for individuals to undertake as unsupported, individual projects. Collecting such comparative data from numerous states is also beyond the localized interests of standing state bar and bench committees. For these reasons, and others summarized in the final section of this paper, special funding may help to stimulate the above suggested research and analyses. 15/

III. IMPROVING THE QUALITY OF STATE COURT DECISIONS.

Litigation Economies. As already indicated, a court system that produces results that come too late or prove too costly will be avoided no matter how enlightened the final decision. Institutional efficiency in reducing the time and cost of arriving at final decisions is, however, not a concern that is peculiar to litigation involving the schools. But the second measure of utility, namely, the rationality of ultimate decisions, turns upon the quality and completeness of information that courts are permitted to use in rendering policymaking decisions. Unfortunately, social scientists tend to leave off their efforts to identify and apply relevant facts at the critical courtroom door where the lawyers

take over. 16/ The rules of trial practice seem to be purely legalistic in nature, but they directly determine the quantum and quality of information that reaches the court, and often exert distorting effects. Legal rules on the conduct of trials do not aim exclusively for completeness of information. They are concerned with assuring credibility of testimony and fair conduct between the contending parties. The latter purposes are often implemented by excluding or delimiting evidence that education specialists consider essential to a truly rational decision. Courts are thus forced at times to pursue individualized justice rather than a policy that best serves the entire school community. The problem of reconciling individual with social "right" is not a dilemma in every case, but it is particularly acute in school litigation.

In order to achieve a better balance between the divergent purposes of rules on admissible evidence, the study of their content and uses in public interest litigation should include the input of social science professionals whose data and insight can easily be misread through the grid of trial practice rules. The literature and research concerning the tensions between legal rules governing adversary systems of tiral, and the development of accurate information to inform the courts on public policy has been dominantly a single discipline

rather than an interdisciplinary effort. I believe the literature would be considerably enriched by interdisciplinary studies of selected lines of education cases.

The adversary system of "trial by combat" between partisan lawyers 17/ is fair game for satirists and playwrights, but we must recognize that it is to some extent embedded in our Constitution. As long as citizens prefer high individual, constitutional immunities, viz. due process, independent counsel, cross-examination, etc., 18/ even at the loss of efficient fact development, even the wisest judges must allow lawyers to invoke legal rules to discredit or exclude evidence, however relevant it may be. Even with these limitations, there remains substantial room to improve trial records and to broaden the input of relevant facts and opinions. Courts still have some leeway to liberalize rules on pretrial discovery and admission of evidence. They still exercise discretion as to how those rules apply to particular case contexts. Whether most state judges presently have the knowledge, awareness, or inclination to adapt or modify those rules is an inquiry which should be pursued.

Even if interdisciplinary studies of school cases do not generate specific solutions, they will at least provide the stimulus to seek new methods to foster better fact and opinion development in trials. There are no

better goads to change than concrete examples of the inadequacy and harmful features of prevailing rules.

One model of extralegal input to court decisions is the process of fashioning consent decrees in education cases. While the consent decree process avoids (by stipulation), rather than revises, traditional rules of evidence, its recent growth manifests the need for and acceptability of empirically developed evidence that might have been excluded in formal adversary trials.

Research along the above lines may also study and report on other alternate hearing techniques, such as court employment of qualified masters or arbitrators who can conduct hearings and investigations free from the strictures of formal trials. Such a study could test the thesis that these and other less rigid hearing proceedings tend to produce a better body of reliable evidence to assist state courts than an adversary hearing. Courts commonly rely upon official administrative expertise; and one may ask why they should not place similar reliance and deference upon hearings by experts who happen not to hold an official administrative post. This is not a simple question, but one that is worthy of exploration.

Oversight of Administrative Decisions. The modern eruption of local school disputes set off a trend in

many states (by both legislative and judicial rules) to divert appeals to education agencies as a precondition to action by the courts. In cases where central state agencies act in a quasi-judicial capacity, i.e. conduct hearings, review evidence, and pass upon the legal claims of individual parties, they relieve the courts of a great burden, and concurrently build up a large body of school law that is binding on all state schools. When parties are thus required to exhaust all administrative appeals before seeking judicial relief, the courts generally confine their overview of agency decisions to narrow questions, i.e. whether the agency committed a clear error of law; committed a clear abuse of its discretion; or made findings that were not supported by sufficient evidence. 19/ The total effects and ramifications of the heavy volume of state agency rulings, especially with respect to displacement of state court functions has not been extensively researched. In states like New York and New Jersey, where the State Commissioners of Education have been extremely active in issuing and compiling case decisions, there is ample material for such a study.

One of the complications arising from an extended process of successive administrative appeals before final disposition by a court, is the uncertain status of the law especially when each intermediate appeal results in modification or reversal of the lower level agency. A

case example is provided by the recent controversy in Pennsylvania over regulations issued by the state Secretary of Education that imposed on local school boards a state Code of Student Rights and Responsibilities. Many local boards had already adopted their own codes of Student Rights and Responsibilities. On the first court appeal, the Commonwealth Court upheld the authority of the school boards and ruled that the state office lacked jurisdiction on the subject. On further appeal, however, the state Supreme Court reversed the Commonwealth Court and reinstated the state code. 20/ Schoolmen were thus forced to change course at least twice over the period of several years that spanned the course of litigation. It would seem that better means could be devised by the courts to maintain stability of school administration while such issues are being tested.

Even greater uncertainty is introduced in day-to-day school administration by emerging decisions under new public employee labor relations statutes. Since public school employees are not governed by the federal labor law, the courts have the responsibility of clarifying interpretations of their state labor statutes. Labor disputes typically run through several stages of administrative decision, beginning with the local school boards, and proceeding in most cases to arbitration, then to

state labor boards, and thereafter to the courts. If school administrators must change their operating standards every time one of the successive forums of decision reverses or modifies a prior agency or court order, the jerk and jolt disruptions in school management may well outweigh the benefits of settling that particular dispute.

I do not suggest that this condition always prevails, or that it is an unavoidable price of labor relations activity. I do suggest that the law and the administrative experience under new state labor statutes can take directions which assuage or aggravate that problem. The actual experience of school administrators in this regard over the last ten years is quite relevant, and may have to be found in the unrecorded experience of school administrators and labor specialists, rather than in the law books. The problem is worthy of case and field studies inasmuch as those studies can inform state authorities on the future direction that the law should take. Such studies could seek to develop proposals to minimize or avoid the shifting impacts of intermediate labor decisions, e.g. by freezing or staying a particular status quo at some designated stage of agency decision, until the legal issue is decided by a final order that is no longer appealable. Whether measures such as these

are or should be employed by state courts would be a pertinent inquiry in any study of state court roles that affect the schools.

Construction of Indeterminate Statutes. The authority of courts to set education policy by filling in the gaps left by vague or generally worded statutes proceeds under the fiction that the court is "interpreting" the unspecified intent of the legislature. How well or poorly they perform this function depends directly upon how well or poorly they apprehend the social and institutional groundwork upon which a particular statute or a group of related statutes operates. Here also, the law as the "mother of the social sciences" should be illumined by the specialized knowledge and perceptions of experts in the education field. What is needed is not case studies as such, but scholarly reports and policy analysis which sketch out the net impact of the alternative interpretations of indeterminate laws.

I have no preferred laundry list of statutory subjects for such studies, but one major area that remains to be shaped by state courts through statutory interpretation involves school labor relations. Developing sound labor law standards for public schools requires rulings on many interrelated provisions of new labor statutes and pre-existing school codes. The courts, however, have been nibbling at different phases of labor

disputes, ad hoc, without calculating the total cumulative effect of their isolated "incremental" decisions. The states are in hopeless conflict as to what subject matter is or is not bargainable, or arbitrable, and as to the permissible effect or remedies of particular contract terms on arbitration rulings. See the excerpt on labor case developments in the attached Appendix. 21/

The extant cases indicate that the legal concepts that courts borrow from traditional law or from the language of particular statutes do not furnish an organizing base to rationalize judicial policymaking on the general subject of school board-teacher labor relations. The subject is large and intricate, and the role of state courts in developing it can only be improved by research that extends beyond the consideration of legal conceptions that precede rather than grow out of the special experience of the schools. At this embryonic state there is ample opportunity for courts to fashion new concepts, criteria and remedies to advance optimum policies on labor dispute resolution in the public schools. How well they do so will, in my opinion, depend on the quality of assistance they receive from educators, administrators and other social science disciplines.

Since there are such numerous areas of school legislation which require judicial clarification or

definition, research planning would be significiantly advanced by a preliminary project that would aim exclusively to identify, explain and list in some relative order of importance the more urgent subjects that should be pursued along the lines I have suggested for the labor area.

State Court Remedies. A potent stimulus to increased resort to federal courts, and corresponding disuse or dissatisfaction with state courts, arises from the contrasting remedial laws of those courts. Federal courts provide a broad range of new monetary awards and equity relief. State courts generally adhere to the more limited forms of relief that were developed in the distant past to serve a different era. The disparity in federal and state remedies is also a product of legislative policy. Modern federal civil rights statutes allow plaintiff victims of discrimination not only to recover money damages, but also to collect from school districts their own attorneys' fees that they would normally have to pay out of their own funds. 22/ Unless state legislation is enacted to provide equally attractive remedies, the state courts cannot match the incentives to plaintiff litigants that now exist in the federal forum.

There are, however, some remedies which state courts can develop independently of enabling legislation. I have already mentioned the backward condition of class actions in state courts, declaratory judgment, and consent

decree process. Further, there is nothing to prevent state courts from supplying tort-type recovery for intangible civil rights injuries as the federal courts have done.

Whether such creation of new rights of action is a good or an evil, I leave aside. My only point is that the role of state courts can be expanded if they consider such remedies proper. Should state courts provide additional remedies to suitors, they will gain some influence over the development of substantive law; and through their expanded participation in school suits may encourage federal judges to exercise their existing power to refer some of their cases to state courts. It would be desirable for state courts to pass upon the measure and size of monetary awards in such cases, inasmuch as state institutions and funds are involved, and federal intrusion into state finances, as a matter of general principle, should be minimized. While the Supreme Court of the United States has led the trend of federal activism, the close divisions within that Court sustain hope that the trend will not become irreversible. 23/

Preliminary studies on the remedial law in sister states that pertain specifically to schools may help courts to improve their performance at the remedial stage of adjudication.

IV. DEVELOPMENTS IN SUBSTANTIVE STATE LAW.

As previously mentioned, state court leadership in shaping school law and policy has not been totally lost to federal courts. Substantive lawmaking, based on independent state law grounds, which only state courts can perform, has had a marked impact on some aspects of school management. So long as the state courts do not reduce federally protected rights, they are free to interpret their state constitutions, statutes and regulations to advance or impede particular educational policy, independently of the federal courts. A few examples of the policymaking options that are open to state courts may be noted here.

After the United States Supreme Court upheld state property tax systems to fund public education, a number of state courts nullified those systems under their respective state constitutions. 24/ While California invoked the Equal Protection Clause of the California Constitution to change practices upheld under the federal Equal Protection principle, New Jersey, and most other states, preferred to rely upon the state constitutional provisions for a thorough and free system of public education. The school finance cases thus indicate that state constitutions may provide several sources to resolve school questions.

With respect to teachers' and students' rights of due process, the United States Supreme Court upheld corporal punishment, and the presumptive validity of school boards as impartial tribunals in teacher disciplinary hearings, 25/ but these federal rulings could not prevent state legislatures and courts from arriving at different conclusions, under their independent construction of state constitutions, state statutes, or administrative regulations. 26/

Many generally worded provisions of state law must be given specific contextual meaning, in changing conditions, to achieve their broadly stated purposes. State courts thus retain considerable discretion to apply these provisions in ways that advance their reading of the goals to be achieved. Whether state courts have, on balance, tended reflexively to imitate the past by their construction of written state laws, or elected to update the laws' applications to advance new policies, is a large and complex question that requires detailed research. It is only certain that the degree of judicial creativity varies from one state to another, and probably from one educational issue to another.

One generalization, however, is permissible, namely, that the front line role of state courts, which are closest to the education scene, can be well handled by them, provided their internal efficiency, in comparison

to the federal courts, is such as to command the confidence and patronage of suitors; and provided further that state legislators and regulators give them the institutional authority and support that they must have to dispose of educational issues effectively.

V. SUMMARY COMMENTS ON RESEARCH SOURCES.

Some of the foregoing suggestions point to studies by lawyers; others to studies by students of school administration; and still others by interdisciplinary teams. The types of specialists selected for any project would obviously depend upon the subject matter, goals, and structure of the specified research. It is often assumed that legal research should be left to lawyers, professional law journals and law reviews. This may be true of pure legal research, but "pure" law is rarely to be found in policy-oriented, public interest areas such as education. It is also clear that some investigations require resources and staff which cannot be marshalled by invididual authors. Research that is specifically concerned with education law and policy is most authoritative when properly structured and supported. It cannot all be left to the accidental interests of editors of law journals. It is also clear that certain problems cannot be relegated exclusively to any

one discipline, be it law, sociology or education. Studies that are narrow and single-minded in perspective will not do for complex social issues. Some thought will have to be given to the means of determining what subjects are or are not fit for single specialty research, and how the product of single specialty research can be coordinated for use with allied research by other disciplines. This is especially true with respect to studies of the interconnections and overlaps of decisional activities by different state authorities, including legislatures, administrative agencies, and state courts. Their processes of shaping educational policy must be seen and appraised in terms of their total combined impact on the schools, and not studied merely to improve the internal efficiency of each respective component of government. The image of the spokes and the wheel is still appropriate. We must worry about the spokes only becuase we need the wheel to move.

1. E.g., 42 U.S.C. §§1983; 2000(e), (e-2); 20 U.S.C. §1401; 29 U.S.C. §§621, 794.

2. Civil Rights Attorneys Fees Award Act of 1976, 42 U.S.C. §1988.

3. "More than one-quarter of the school systems . . . contain 6.6 percent of the pupils. Conversely, more than one-quarter of the pupils are enrolled in 19.2 percent of the schools centered in only 1.2 percent of the school systems." National Center For Education Statistics, The Condition of Education (1979 ed.) p.79 (Chart 2.15).

4. "The Constitution and the Law of the United States . . . shall be the supreme law of the land, and the Judges in every state shall be bound thereby. . . ." Art. VI, U.S. Constitution.

5. See paper by J. T. Murphy, "The State Role in Education" (1/23/80).

6. For a good illustration of these points, see e.g., Anderson, School Finance Litigation, The Styles of Judicial Intervention, 55 Wash. L.Rev. 137 (1979).

7. "And under the standard of substantiality established by Hagans v. Lavine, 415 U.S. 528 . . ., such a constitutional claim would not be hard to construct." (Stewart, J. dissenting), Chapman v. Houston Welfare Rights Organization, ___ U.S. ___, 99 S.Ct. 1905 (1979).

8. For examples of implied private rights of actions see: Cannon v. U. of Chicago, ___ U.S. ___ (1979) (sex discrimination under Title IX); Bossier Parish Sch. Bd. v. Lemon, 370 F.2d 847 (5th Cir. 1967) cert. den., 388 U.S. 911 (1967) (implied private right of action under Title VI); Serna v. Portales Mun. Schools, 499 F.2d 1147 (10th Cir. 1974) (implied private right of action under Title VI and the Bilingual Education Act).

   See generally, Note, Implied Right of Action to Enforce Civil Rights: The Case for a Sympathetic View, 87 Yale L.J. 1378 (1978); Note, Implied Rights of Action Under Federal Statutes, 18 Wm. & Mary L.Rev. 429 (1976).

9. See note 4, supra.

10. Compare Regents, U. of California, 441 U.S. ___, 98 S.Ct. 2733 (1979) with DiLeo v. Bd. of Regents, U. of Colorado, 590 P.2d 486 (Colo. 1978), cert. den. 47 U.S.L.W. 3698 (1979).

11. Note, Standing to Challenge Special Admissions Programs, 50 U. Colorado L.Rev. 361 (1979).

12. E.g., Vasquez v. Superior Court, 4 Cal.3d 800, 484 P.2d 964 (1971).

13. See generally, Vestal, Uniform Class Actions, 63 A.B.A.J. 837 (June, 1977).

14. The much looser proceedings for Advisory Opinions by courts on questions submitted by state legislatures is not here covered, since it is used in only a few states.

15. See pp.32, 33.

16. Technical rules of evidence are critical to "the chief work of the trial courts." ". . . many 'rule-skeptics' . . . maintain that legal uncertainty is restricted, . . . to the growing points in the rules, to the cases where the facts present novel situations or where, under the impact of newly emerging social needs or altered policy attitudes, the courts change the rules." J. Frank, Fact Skepticism, 316-321 (1949).

17. The distortions of fact effected by legal technicalities are well summarized by respected jurists, past and present. See T. Arnold, Symbols of Government; M. Frankel, The Search for Truth, 123 U.Pa.L.Rev. 1031 (1975).

18. E.g., evidence tainted by an unlawful search, no matter how valuable the evidence, or how unintentional the breach of Fourth Amendment rights, must be excluded from consideration at trial.

19. The exceptions to the mentioned principles are not dealt with here because they are not particularly germane to the present discussion.

20. Girard School District v. Pittenger, 392 P.2d 261 (Pa. 1978).

21. See also, Note, Defining the Scope of Bargaining for Teacher Negotiations, a Study of Judicial Approaches, 24 Labor L.J. 644 (1978); Toole, Judicial Activism in Public Sector Grievance Arbitration: A Study of Recent Developments, 33 Arbitration J. No.3, p.6 (1978); Jascourt, Can a Compulsory Arbitration Work in Education Collective Bargaining, 4 Jounral of Law and Education, 641 (1975); Gallagher, Interest Arbitration Under the Iowa Public Employment Relations Act, 33 Arbitration J. No. 3, p.30 (1978).

22. See note 8, supra.

23. See e.g., Owen v. City of Independence, ___ U.S. ___ (1980); Monell v. New York City Department of Social Services, 436 U.S. 658 (1978).

24. Compare San Antonio Independent Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) with Serrano v. Priest (II), 557 P.2d 929 (Cal. 1976); Robinson v. Cahill, 358 A.2d 457 (N.J. 1976); Board of Education v. Nyquist, 408 N.Y.S.2d 606 (1978). But see contra: Olsen v. State, 554 P.2d 139 (Ore. 1976); Milliken v. Green, 212 N.W.2d 711 (Mich. 1973). For other state authorities, see W. Valente, Law in the Schools, p.329 (1980) (Charles E. Merrill Publishing Co.)

25. Ingraham v. Wright, 430 U.S. 651 (1977); Hortonville Jt. Sch. Dist. No. 1 v. Hortonville Education Association, 426 U.S. 481 (1976).

26. See e.g., Roberts v. Way, 398 F.Supp. 856 (Vt. 2975); N.Y. Penal Law §35.10 (McKinney 1975).

Part III

Collective Labor-Management Relations *

Teachers have a constitutional right to form and join labor organizations as part of the right of association. This right, however, does not confer any right to strike[400] or oblige school districts to confer or bargain with teacher organizations.[401] For this reason, a growing number of states have enacted the statutes that are needed to permit or require school boards to negotiate with teacher associations. The first such law was enacted in Wisconsin in 1959. Many questions remain to be clarified under these statutes, and as one authority put it: "there is not as yet anything approaching a common law of public sector public relations."[402]

As of 1975, more than forty states had some form of public employee labor law. Of these, twenty-nine authorized collective negotiations by public school teachers. The law varies widely on such important topics as unit composition, the subjects of bargaining, methods of dispute settlement, union security, and the right to strike. (A comparison of state labor laws appears in table 5-2.[403]) Public sector bargaining made its greatest impact in public education, where the rate of unionization, wage gains, and work stoppages have far exceeded those of any other governmental units. * * *

*Excerpts from Valente, Law in the Schools, pp.211, 216-219, 223 (Chas. E. Merrill, 1980).

APPENDIX I

2. The Scope of Collective Bargaining

Several basic questions are encountered in negotiating a collective agreement:

1. What subject matter can or must a board refuse to negotiate?[416]
2. What matters *must* be "bargained" until both sides agree?
3. What matters need only be discussed (meet and discuss), leaving ultimate unilateral decision solely with the board?

In many states, these questions are neither anticipated nor addressed by laws or by new labor statutes; and they may be affected by how earlier general education statutes are interpreted in the light of overlapping special labor relations statutes. For example, how do statutes and regulations dealing with budget law, professional standards and educational policies affect rights to bargain employment conditions that in turn affect those statutory and regulatory policies?

The courts and administrative bodies have taken different approaches to these questions. The most favored approach is "incremental"—to decide only narrow points, item by item, rather than fashion a general rule of bargainability for all contested items.

a. Statutory restrictions. Eight states, by statute, restrict all negotiations to a "meet and discuss" consultation, but the effect of agreements so made is not the same in each of those states. (See table 5–2.) The majority of state bargaining statutes mandates mutual bargaining by the board, but most of these also carve out from mandatory bargaining certain subjects that are classified as *exclusive management rights.* The exclusions vary from blanket references to managerial powers to itemized specifications of particular subjects.[417] Table 5–2 identifies states that use the broad standard of nonnegotiability (inherent managerial rights) and those that specify particular items as nonbargainable (e.g., tenure determination, pension rights or budgets).

In deciding how new labor statutes operate with relation to preexisting school codes, the courts have not developed a fixed pattern. A few courts have attempted specification of subjects that are bargainable and nonbargainable, but most courts declined to define fixed categories of bargainable or nonbargainable items.[418] The case-by-case approach weighs the element of board policy control in each case setting against its effect on teacher working terms and conditions, to arrive at a limited decision.[419] This balancing standard enlarges the discretion of labor boards, since they presumably have special competence and their judgments will not be lightly overturned by the courts.

None of the current approaches to bargainability has produced consistent results. For instance, many courts remain divided on the bargainability of class size.[420] The softness of court decisions on class size bargaining is indicated by New York cases, which first ruled that it was not mandatory, but later concluded that teacher workloads, when affected by class size decisions, were bargainable.[421] Similar distinctions were made in Connecticut between class size (held to be bargainable) and scheduling of working hours and length of the school day (held not to be bargainable).[422] School calendar was considered bargainable in Wisconsin, but with dictum hinting that curriculum matters were not bargainable.[423] Court interpretations of labor statutes may always be reversed by legislative amendments. The legislature in Nevada, in reaction to court decisions to the contrary, amended the labor laws to exclude from mandatory bargaining such items as class size, school calendar, work load, and teacher selection.[424]

Board decisions concerning promotional and supervisory appointments, teacher transfers, tenure, and nonrenewal have generally been held to be not bargainable.[425] Several courts have also ruled that boards could not bargain away decisions regarding budget reductions and job eliminations.[426] Nevertheless, there is a growing line of decisions that distinguish between the right to decide and the method of executing a decision. Thus, decisions on management rights may still require bargaining or arbitration as to the *procedures* for implementing them when they affect teacher work.[427] It may be necessary to informally discuss

the board's policy decision before negotiating the specifics of implementation. This discussion may eliminate time-consuming bargaining that only results in procedures and grievance mechanisms that make it almost impossible to carry out the management policy.

In addition to mandatory bargaining, a board may expand the scope of negotiations to include items of "permissive" bargaining, which includes subjects it could legally refuse to bargain, but on which it is not legally prohibited from bargaining. Unless elective bargaining is ultra vires or contrary to public policy, agreements are legal and enforceable.[428] The cases from industrial states indicate a trend toward extending permissive bargaining to any item that is not "explicitly and definitely prohibited by statute", but the trend is by no means universal.[429]

The explosive issue as to whether school boards must bargain their decision to contract to outside sources, work that would otherwise be performable by employees in-house, remains largely untested in public education. A California statute authorizing school districts to contract pupil driver training instruction to private contractors was upheld, but courts in Michigan and Wisconsin held that board decisions to contract bus and food services so affected employee "working terms and conditions" that they were subject to mandatory negotiation with the bargaining agent of affected employees.[430]

The scope of bargaining is also affected by alleged conflicts between the provisions of new labor statutes and those of older education statutes regarding school management. Unless both statutes can be harmonized by statutory construction, courts must decide which statute was intended to prevail. Since the legislative history of statutes varies with each state, the state courts can be expected to arrive at diverse results. For example, in Connecticut the terms of a lawfully bargained agreement "shall prevail" over any conflicting law or regulation, but in Massachusetts, the terms of prior laws prevailed over later inconsistent labor laws.[431] Most states lack a clear rule; their courts can either read the labor laws narrowly and interpret general education laws to restrict the scope of bargaining (as in South Dakota), or read the labor statutes broadly as intended to control in doubtful cases.[432] The tendency to uphold bargained terms under labor statutes has not been uniform. For instance, where the labor agreement provides *less* protection for teachers than education statutes, courts may nullify the agreement as contrary to public policy. Statutory provisions on teacher dismissal and maternity leave were held to supersede bargained terms in New York, and an arbitrator's order upholding teacher dismissal pursuant to labor agreement was voided as contrary to general education statutes in Pennsylvania.[433] Statutory regulation of teacher layoff and seniority credit were also held controlling over inconsistent labor agreements in Washington.[434]

The uneven results on the interaction of labor statutes and education statutes are best explained by the fact that judicial reasoning in labor disputes is much more pragmatic than in other areas of law. New York courts would not permit a "back door" grant of tenure via a bargained agreement procedure, even though it favors the teacher, nor would a Georgia court permit a teacher union, through a bargained agreement, to decide how a package of negotiated wage benefits should be distributed among different classes of teachers.[435] Similarly, Pennsylvania and Wyoming courts held that school boards could not surrender by agreement, managerial control over teacher transfers. A board agreement prohibiting board member access to teacher files was held unlawful and unenforceable in New York.[436]

Perhaps the most telling long run influence on issues of bargainability will be the development of accepted labor practices. When experience reveals what subjects can be effectively bargained without harm to school management and the general public, legislatures and courts are likely to adopt them into formal law. As with the common law, lawmakers prefer to seek and follow proven custom in difficult areas.

* * *

The legality of arbitration awards turns ultimately upon a court's interpretation of whether the award is consistent with related state statutes. New Jersey courts upheld arbitration on changes of teacher duties, but voided arbitration of class schedule changes on the ground that the former item was bargainable, but that the latter item was not.[455] Bargained agreements on class size and seniority credits were held enforceable in arbitration in New York.[456]

State courts differ on the arbitrability of disputes concerning supervisory positions, to arbitration resolution, but one upheld an arbitration order that a grievant be promoted.[457] Courts are however loathe to sustain arbitration orders that require a school district to grant tenure, even to an improperly dismissed teacher.[458] The narrowness of arbitration scope rulings is indicated by decisions that upheld arbitration awards for the payment of sick leave and for reinstatement to an improperly abolished position.[459] New Jersey law gives the Public Employees Relations Commission discretionary power to suspend arbitration proceedings and provides an exception to the general rule that valid arbitration agreements will be enforced.[460]

TABLE 5-2. Summary of state laws on teacher bargaining*

STATE	AUTHORITY	RECOGNITION	BARGAINING OBLIGATION	STRIKES	UNION SECURITY	
					REQUIRED MEMBERSHIP	CHECK-OFF
Alabama	(S)	Exc.	Meet & Discuss	—	—	**
Alaska	(S) §14.20.550	Exc.	Comp.	Qualified right	—	—
Arizona	Case Law	—	Perm.	—	—	Perm.
Arkansas	Case Law	—	Perm.	Prohibited	—	Emp'ee. Auth'n.
California	(S) Ed. Code §13080	Proportional where more than 1 union	Meet & Discuss	Prohibited	Agency shop prohibited	—
Colorado		General	Meet & Discuss	—	—	—
Connecticut	(S) Gen. Stat. Ann. §10-153a	Exc.	Comp.	Prohibited	—	—
Delaware	(S) Del. Code tit. 14 §4001	Exc.	Comp.	Prohibited	Union Shop Prohibited	Emp'ee. Auth'n.
D. of Col.	De Facto Practice	—	—	—	—	—
Florida	(S) Fla. Ann. §230.22.	Exc.	Comp.	Prohibited	—	Emp'ee. Auth'n.
Georgia	Atty. Gen. Op.	—	Perm.	—	—	—
Hawaii	Haw. Rev. Stat. 89-1 et seq.	Exc.	Comp.	Qualified Right	Agency Shop Comp.	Emp'ee. Auth'n.
Idaho	(S) Id. Code §33-1271 et seq.	Exc.	Comp.	—	—	—
Illinois	Case Law	—	Perm.	Prohibited	—	—
Indiana	Ind. Code Ann. §20-7.5-1-1	Exc.	Comp.	Prohibited	—	Perm.
Iowa	Iowa Code Ann. 90.15 et seq.	Exc.	Comp.	Prohibited	Perm.	Emp'ee. Auth'n.
Kansas	Kans. Stat. Ann. §72-5413	Exc.	Comp.	Prohibited	No provision	No provision
Kentucky	Atty. Gen. Op.	—	Perm.	Case Law	No provision	No provision
Louisiana			Perm.	No provision	No provision	Emp'ee. Auth'n.
Maine	Me. Rev. Stat. tit. 26 §961	Exc.	Comp.	Prohibited	No provision	No provision
Maryland	Md. Educ. Code Ann. Art. 77 §160	Exc.	Comp.	Prohibited	No provision	No provision
Mass.	Mass. Gen. Laws Ann. ch. 149 §178G (West)	Exc.	Comp.	Prohibited	Agency Shop Perm.	Emp'ee. Auth'n.
Michigan	Stat. Mich. Comp. Laws Ann. §423.201	Exc.	Comp.	Prohibited	Agency Shop Perm.	—
Minn.	Stat. Minn. Stat. Ann. §179.61 (West)	Exc.	Comp.	Prohibited	Agency Shop Perm.	Emp'ee. Auth'n.
Miss.	—	—	—	—	—	—
Missouri	Atty. Gen. Op.	—	Meet & Discuss	No provision	No provision	No provision
Montana	Stat. (S) Mont. Rev. Code tit. 75 §61-15 et seq.	Exc.	Comp.	Qualified Right	No provision	No provision
Nebraska	Stat. (S) Neb. Rev. Stat. §79-1287	Members only	Meet & Discuss	Prohibited	No provision	No provision
Nevada	Nev. Rev. Stat. 238.010	Exc.	Comp.	Prohibited	No provision	No provision
New Hampshire	Stat. N.H. Rev. Stat. Ann. §31-3	Perm.	Perm.	Qualified rights	—	—
New Jersey	N.J. Stat. Ann. §34:13A-1	Exc.	Comp.		Agency shop Prohibited	—
New Mexico	Atty. Gen. Op. & Case Law	—	Perm.	—	—	—
N. Y. State	N. Y. Civil Service Law §200 (McKinney)	Exc.	Comp.	Prohibited	Agency Shop Perm.	Emp'ee. Auth'n.

TABLE 5-2. Summary of state laws on teacher bargaining (*cont.*)

STATE	AUTHORITY	RECOGNITION	BARGAINING OBLIGATION	STRIKES	UNION SECURITY	
					REQUIRED MEMBERSHIP	CHECK-OFF
N. Y. City						
N. Carolina	Stat.	—	Prohibited	—		—
N. Dakota	Stat. (S) N. Dak. Cent. Code §15-38.1	Exc.	Comp.	Prohibited	No provision	No provision
Ohio	Stat. Ohio Rev. Code	Stat.	—	Prohibited		Perm.
Oklahoma	Stat. (S) Okla. Stat. Ann. tit. 70 §509	Exc.	Comp.	Prohibited	No provision	No provision
Oregon	Stat. Or. Rev. Stat. §342.440	Exc.	Comp.	Qualified Right	Union & Agency Shop Perm.	—
Penna.	Stat. Pa. Stat. Ann. tit., 43 §1101, 101 (Purdon)	Exc.	Partially comp. Part. Meet & Discuss	Qualified Right		Perm.
Rhode Island	Stat. (S) R.I. Gen. Laws §28-9.3-1	Exc.	Comp.	Prohibited	Agency Shop Perm.	Perm.
S. Carolina	Atty. Gen. Op. only So. Car. Code L.1962 1-66	—	Prohibited		—	—
S. Dakota	Stat. S.D. Compiled Laws Ann. §3-18-1	Exc.	Comp.	Prohibited	—	Perm.
Tennessee	Case Law	—	Prohibited	Prohibited	—	—
Texas	Stat. Tex. Educ. Code Ann. §21.905	Prohibited	Prohibited	Prohibited	—	—
Utah	Atty. Gen. Op.	—	Perm.	—	—	—
Vermont	Vt. Stat. Ann. tit. 16 §1981	Exc.	Comp.	Qualified Right	—	No provision
Virginia	Stat.	—	Perm. (Atty. Gen. Op.)	Prohibited	—	—
Washington	Stat. (S) Wash. Rev. Code Ann. §28.72.010	Exc.	Meet & Discuss	No provision	Perm.	Perm.
W. Virginia	Atty. Gen. Ops. & Case Law	Perm.	Meet & Discuss	Prohibited	—	—
Wisconsin	Stat. Wis. Stat. Ann. §111.70 (West)	Exc.	Comp.	Prohibited	Agency Shop Perm.	Emp'ee. Auth'n.
Wyoming	—	—	—	—	—	—

* This Summary must be updated in light of continuing annual revision of public employee labor relations laws by state legislatures.

** Prohibited in Ala. counties having populations of 10,900 to 11,500.

Key Symbols:
S = Statute
Exc. = Exclusive.
Perm. = Permissible, but not required.
Comp. = Made compulsory by law.
Emp'ee. Auth'n. = Individual employee authorization is required to make dues deductions.
"Qualified" means that statutory proceedings must be exhausted before strike can commence or strike is terminable by court order.